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**SECRETARY, BOARD OF
OIL, GAS & MINING**

**BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

**IN THE MATTER OF THE
APPLICATION OF WESTWATER
FARMS, LLC FOR ADMINISTRATIVE
APPROVAL OF THE HARLEY DOME
1 SWD WELL LOCATED IN SECTION
10, TOWNSHIP 19 SOUTH, RANGE 25
EAST, S.L.M., GRAND COUNTY,
UTAH, AS A CLASS II INJECTION
WELL**

**REQUEST FOR REHEARING AND
MODIFICATION OF EXISTING
ORDER, AND IN THE
ALTERNATIVE, REQUEST FOR A
STAY OF THE ORDER ISSUED ON
JANUARY 13, 2011**

Cause No. UIC-358.1

Living Rivers ("LR") respectfully requests a rehearing and modification of the Findings of Fact Conclusions of Law and Order signed by the board chairman on January 13, 2011. The basis for this Motion for Rehearing, Modification of an Existing Order and/or the Motion to Stay is based on the following

- 1 LR has prepared and attached hereto a memorandum concerning the appeals procedure, which states the rights of the appellant in a matter such as docket number 210-029, attached Exhibit A, which is incorporated herein by this reference

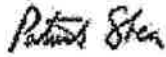
- 2 The basis of this request for reconsideration is additional information, which has been submitted to the Grand County Planning and Zoning Commission as well as a memorandum to the Grand County Council, which are attached hereto marked Exhibit B and incorporated herein by this reference.

- 3 LR being a not-for-profit organization has sought and obtained an expert witness, Professor Kip Solomon, Chairman of the Department of Geology, University of Utah. In a preliminary discussion with Dr. Solomon he has indicated that there are additional questions that need to be examined before the public safety and welfare for the citizens of Grand County and the State of Utah can be properly protected. In particular, Dr. Solomon believes it to be prudent for the application of West Water Farms to have a condition on its injection well permit requiring a system which will allow underground monitoring of where the injected fluids, under the proposed application, are located and where they will be migrating. The cost of drilling such a monitoring system is significantly less than the cost of drilling the injection well.

Based upon these and the reasons detailed in Exhibit A and B, LR respectfully requests the Board to grant a rehearing or a modification of its order of January 13, 2011. In particular, the January 13, 2011 Order of the Board be modified to require the Applicant to establish a system of monitoring the volume and migration of the injected fluids to protect the Colorado River. In the alternative, should the Board decide not to reconsider, that they issue an order staying any further proceedings by the applicant or utilizing the

injection well for a period of at least 30 days so LR may take an appeal pursuant statute to the Utah Supreme Court.

Respectfully submitted this 1st day of February 2011



Patrick A. Shea
Counsel for Living Rivers



Jacque M. Ramos
Counsel for Living Rivers

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing **REQUEST FOR RECONSIDERATION AND IN THE ALTERNATIVE REQUEST FOR A STAY OF THE ORDER ISSUED ON JANUARY 13, 2011**, postage prepaid, this 1st day of February 2011 to the following:

Steven F Alder
Assistant Attorney General
Board of Oil, Gas and Mining
1594 West North Temple, Suite 300
Salt Lake City, Utah 84116

Michael S Johnson
Assistant Attorney General
Board of Oil, Gas and Mining
1594 West North Temple, Suite 300
Salt Lake City, UT 84116

Grand County
Road Development
125 East Center
Moab, Utah 84532

United States Bureau of Land Management
Moab Field Office
82 East Dogwood
Moab, UT 84532

Federal Highway Administration
2520 West 4700 South, Suite 9-A
Salt Lake City, UT 84118-1847

Mid-America Pipeline Company
171 7 South Boulder Avenue
Tulsa, OK 74121-1628

Utah School and Institutional Trust Lands Administration
675 East 500 South, Suite 500
Salt Lake City, UT 84102-2818

Petro Resrc Corp
777 Post Oak Blvd, Suite 910
Houston, TX 77056

RMOC Holdings, LLC
921 East Belleview Avenue
Littleton, CO 80121

Shiprock Helium, LLC
PO Box 51166
Amarillo, TX 79159

Retamco Operating, Inc
Attn: Joe Glennon
PO Box 790
Red Lodge, MT 59068-0790

Bill Love
2871 East Bench Road
Moab, Utah 84532

United States Fish and Wildlife Service
Attn: Larry Crist
Utah Field Office 2369 West Orton Circle, Suite 50
West Valley City, Utah 84119

Peterson Shen

Exhibit A

LIVING RIVERS APPEAL PROCEDURE MEMO

Under Utah Code Section 40-6-5(5)(a), “[t]he board has exclusive jurisdiction” over class II injection wells, like to the one at issue in this matter, as well as “pits and ponds in relation to these injection wells.” U.C.A. 40-6-5(5)(a)(2010). In exercising this jurisdiction, the Board of Oil, Gas, and Mining and the Division of Oil, Gas, and Mining shall comply with, and the parties are subject to, the procedures and requirements of Administrative Procedures Act, found at Title 63G, Chapter 4.

Pursuant to Utah Code Section 63G-4-401, “[a] party aggrieved may obtain judicial review of final agency action, except in actions where judicial review is expressly prohibited by statute[,]” after exhausting all administrative remedies available. U.C.A. 63G-4-401(1)(a)&(b). There are two exceptions to the requirement for exhaustion of all administrative remedies: (1) if exhaustion is not required by statute; and (2) the administrative remedies are inadequate or exhaustion of remedies would result in irreparable harm disproportionate to the public benefit deprived from requiring exhaustion.” *Id.* If these requirements are satisfied, the party must file “[a] petition for judicial review of final agency action within 30 days after the date that the order constituting final agency action is issued or is considered to have been issued under Subsection 63G-4-302(3)(b).¹ See. 63G-4-401(3)(a)(2010).

The Court in which one must file an appeal, is the Supreme Court of Utah or the Utah Court of Appeals when final agency action is the result of a formal adjudicative proceedings. U.C.A. 63G-4-403(1)(2010). If the proceeding is deemed informal, the

¹ U.C.A. 63G-4-302(3)(b) deals with reconsideration motions in that “if the agency head or the person does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied.”

district courts have jurisdiction to conduct trial de novo. U.C.A. 63G-4-402 (2011).

Utah Code 63G-4-403(4) outlines when the appellate court may grant relief, specifically:

- (a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

- (b) the agency has acted beyond the jurisdiction conferred by any statute;

- (c) the agency has not decided all of the issues requiring resolution;

- (d) the agency has erroneously interpreted or applied the law;

- (e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

- (f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

- (g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

- (h) the agency action is:

- (i) an abuse of the discretion delegated to the agency by statute;

- (ii) contrary to a rule of the agency;

- (iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

- (iv) otherwise arbitrary or capricious.

U.C.A. 63G-4-403(4)(2011).

In addition to filing the appeal, pursuant to Utah Code Section 63G-4-405, parties, during the pendency of judicial review, may petition the agency for a stay or other temporary remedies unless extraordinary circumstances require immediate judicial intervention. U.C.A. 63G-4-405(1) and (2) (2010). If the stay is denied, you may seek

judicial intervention:

If the agency has denied a stay or other temporary remedy to protect the public health, safety, or welfare against a substantial threat, the court may not grant a stay or other temporary remedy unless it finds that:

- (a) the agency violated its own rules in denying the stay; or
- (b) (i) the party seeking judicial review is likely to prevail on the merits when the court finally disposes of the matter;
- (ii) the party seeking judicial review will suffer irreparable injury without immediate relief;
- (iii) granting relief to the party seeking review will not substantially harm other parties to the proceedings; and
- (iv) the threat to the public health, safety, or welfare relied upon by the agency is not sufficiently serious to justify the agency's action under the circumstances.

U.C.A. 63G-4-405(4)(2011).

Exhibit B

Memorandum

To: Grand County Council
Grand County Attorney
CC: Grand County Planning and Zoning Commission
From: Pat Shea and Jacque Ramos, Counsel for Living Rivers
Date: Monday, January 24, 2011
Re: Westwater Farms Application

We represent Living Rivers. On January 12, 2011, Pat Shea attended a Grand County Planning and Zoning Commission meeting to discuss the application for a conditional use permit of Westwater Farms to establish an injection well near Cisco, Utah in Grand County. During the course of the meeting it was represented by the County Attorney that the Planning and Zoning Commission, and in turn, the Grand County Council could not create additional conditions to the Westwater Application for a conditional use permit.

During the course of the meeting Pat Shea stated he would prepare a memorandum which respectively disagreed with your County Attorney. After research and discussing the matter with experts in the area of water law, injection well law, and public and health safety codes for counties, our legal conclusions contained below are that Grand County, whether it is the Planning and Zoning Commission or the County Council can, and we would argue should, establish two additional conditions to the Westwater Farms application. Those conditions are:

1. Require Westwater Farms to drill monitoring wells in a strategic location so that if any unexpected migration of the more than 330,000 gallons of injected waste water per day being injected into the Wingate formation migrate to places not anticipated or at a rate not anticipated, Grand County would be able to take notice as soon as possible and take the necessary remedial steps to avoid potential problem with the nearby Colorado River.
2. Westwater Farms agrees to submit for County review every six months the progress it is making to complete the entire project with the condition that the if the additional structures promised have not been completed within eighteen months of the application being granted, Grand County retains the right to terminate the conditional use permit.

Analysis

Under Utah Code Section 40-6-5, the Board of Oil, Gas, and Mining (hereinafter "Board") "[h]as jurisdiction over all persons and property necessary to enforce . . ." the provisions found under U.C.A. 40-6-1, et seq. and must enact rules in accordance with Utah Administrative Rulemaking Act. U.C.A. 40-6-5(1)(2011). Pursuant to these provisions the board only has exclusive jurisdiction over class II injection wells, like to the one at issue in this matter, as well as "pits and ponds in relation to these injection wells. U.C.A. 40-6-5(5)(a)(2010).

The Board has authority to regulate:

(a) all operations for and related to the production of oil or gas including:

(i) drilling, testing, equipping, completing, operating, producing, and plugging of wells; and

(ii) reclamation of sites;

(b) the spacing and location of wells;

(c) operations to increase ultimate recovery, such as:

(i) cycling of gas;

(ii) the maintenance of pressure; and

(iii) the introduction of gas, water, or other substances into a reservoir;

(d) the disposal of salt water and oil-field wastes;

(e) the underground and surface storage of oil, gas, or products; and

(f) the flaring of gas from an oil well.

U.C.A. 40-6-5(3)(2011); see also, *Associated Gen. Contrs. v. Bd. of Oil*, 2001 UT 112, ¶ 19, 38 P.3d 291 (Utah 2001).

However, under County Land Use, Development, and Management Act, U.C.A. Section 17-50-301, the powers of a county may be exercised only by the county executive and county legislative body or by agents and officers acting under their authority or under authority of law. U.C.A. 17-50-301 (2011). The general powers of the County include “[p]roved[ing] a service, exercis[ing] a power, or perform[ing] a function that is reasonably related to the safety, health, morals, and welfare of county inhabitants, except as limited or prohibited by statute.” U.C.A. 17-50-302(1)(ii)(2011). Indeed, the County has general land use authority:

To accomplish the purposes of this chapter, counties may enact all ordinances, resolutions, and rules and may enter into other forms of land use controls and development agreements that they consider necessary or appropriate for the use and development of land within the unincorporated area of the county, including ordinances, resolutions, rules, restrictive covenants, easements, and development agreements governing uses, density, open spaces, structures, buildings, energy-efficiency, light and air, air quality, transportation and public or alternative transportation, infrastructure, street and building orientation and width requirements, public facilities, fundamental fairness in land use regulation, considerations of surrounding land uses and the balance of the foregoing purposes with a landowner's private property interests, height and location of vegetation, trees, and landscaping, unless expressly prohibited by law.

U.C.A. § 17-27a-102(b)(2011).

“[E]ach county, municipality, school district, charter school, local district, special service district, and political subdivision of the state shall conform to any applicable land use ordinance of any county when installing, constructing, operating, or otherwise using any area, land, or building situated within the unincorporated portion of the county.” UCA § 17-27a-305(1)(a)(2011). Moreover, a county may impose regulations upon the

location of a project that are necessary to avoid unreasonable risks to health or safety, as provided in Subsection (4)(f).¹ U.C.A. § 17-27a-305(3)(b)(i)(B)(2011). Moreover, “[a] conditional use shall be approved if reasonable conditions are proposed, or can be imposed, to mitigate the reasonably anticipated detrimental effects of the proposed use in accordance with applicable standards.” U.C.A. 17-27a-506(2)(a)(2011). However, “(b) If the reasonably anticipated detrimental effects of a proposed conditional use cannot be substantially mitigated by the proposal or the imposition of reasonable conditions to achieve compliance with applicable standards, the conditional use may be denied.” *Id.*

Of note, however, under U.C.A. § 17-27a-508(h)(2011),

A county may not impose on a holder of an issued land use permit or approved subdivision plat a requirement that is not expressed:

(i) in the land use permit or subdivision plat documents on which the land use permit or subdivision plat is based, or the written record evidencing approval of the land use permit or subdivision plat; or

(ii) in this chapter or the county's ordinances. *Id.*

Conclusion

In sum, Grand County Planning and Zoning Commission does have the authority to impose the conditions on Westwater's permit including conditions of monitoring wells. Therefore, Living Rivers respectfully requests the Grand County Council to impose two conditions on the issuances of the requested conditional use permit by Westwater Farms. Those conditions are:

1. The Applicant shall install sufficient monitoring wells, as determined by a hydro geologist, to monitor the impact of the proposed daily injection of 6,500 barrels (330,000 gallons) into the Wingate formation five miles from the Colorado River.
2. The Applicant be required to report every six months on the building progress for the overall injection well project particularly as it relates to the proposed water purification facility. If after eighteen months sufficient progress to completion of the overall project is not being made, Grand County may at its reasonable discretion terminate the conditional use permit granted earlier.

¹ U.C.A. § 17-27a-305(4)(f) provides that county may not “impose regulations upon the location of an educational facility except as necessary to avoid unreasonable risks to health or safety.”